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In The

Supreme Court of the United States

October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO CERTIORARI PURSUANT TO RULE 22.6 REGARDING *EVANS v. CITY OF CHICAGO*, NOS. 87-3006, 87-3085, 1989 U.S. APP. LEXIS 5899 (7TH CIR. APR. 27, 1989)

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I. REASON FOR SUPPLEMENTAL BRIEF

Respondents submit this Supplemental Brief, pursuant to Supreme Court Rule 22.6, in opposition to Kaiser's Petition for Certiorari to address a new case that was not available at the time of Respondents' last filing.

This new case, *Evans v. City of Chicago*, Nos. 87-3006 and 87-3085, 1989 U.S. App. LEXIS 5899 (7th Cir. Apr. 27, 1989), which was cited in Petitioners' Reply Brief at 2, demonstrates the fallacies in Kaiser's arguments and the reasons why the issues presented in Kaiser's certiorari petition do not present any issues with any ongoing precedential value, and why the issue of the applicable law was properly decided in favor of Respondents by the Court below.

The contrast between the issues presented in the *Evans* case and the issues in the present case vividly demonstrates the difference between: (1) collateral attack on a final controlling judgment by retroactive application of new law (*Evans*) and (2) procedural changes affecting pending litigation (*Bonjorno v. Kaiser*).

II. THE *EVANS* CASE ILLUSTRATES THE FALLACY OF KAISER'S CONTENTIONS REGARDING REASONS FOR REVIEW BY THIS COURT

A. The *Evans* Case Did Not Address The Issue Of Application Of Amended 28 U.S.C. §1961 To Cases Pending As Of The Effective Date Of The Amendment With Interest Issues Still Currently Pending In The Courts

The *Evans* case involved a class action by several separate plaintiff classes of judgment creditors holding judgments against the City of Chicago. The classes

contended that the City of Chicago denied them equal protection of the laws or due process, by its policy regarding delay of payment of judgments.

The three class representatives in the *Evans* suit (Silvia Evans, Bertha Balark, Curtis Collum) sought relief relating to the delay by the City of Chicago in paying their judgments that had already been rendered as final controlling judgments on which interest could also be collected,[1] *prior* to October 1, 1982. Thus, none of the class plaintiffs in the Evans case was in a position similar to the Plaintiffs/Respondents in the present case, a case where there was no final judgment and which was pending unresolved in the courts as of the effective date of the amendment to 28 U.S.C. §1961, and where the interest issues are still pending today.

The parties in the *Evans* case did not raise any issue as to the applicability of amended 28 U.S.C. §1961 to any of the judgments at issue in the *Evans* case. The Seventh Circuit in its Opinion in *Evans*, however, sua sponte noted this issue. Citing its prior decision in *Merit Insurance Company v. Leatherby Insurance Company*, 728 F.2d 943, 944 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984), the Seventh Circuit stated that the new rate of interest provided in amended 28 U.S.C. §1961 "does not apply to judgments entered before the effective date of the statute."

The Seventh Circuit stated, however, "[o]n judgments entered in federal district court after October 1, 1982, the City must pay the interest rate prescribed by 28 U.S.C. §1961(a) and provide all relief ordered by the court."

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[1] The "Collum" class members in the *Evans* case were judgment creditors unwilling or unable to wait out the delay in payment. They had discounted their judgments by selling them to third parties. *See Evans*, 1989 U.S. App. LEXIS 5899, *5-*6.

Although the class of judgment creditors certified in the *Evans* case might conceivably include some judgment creditors whose original district court judgments were entered prior to the effective date of the statute, and whose cases were pending on appeal as of the effective date of the amendment, there is no suggestion that any such limited members of the class timely preserved the issue of the applicable interest rate, as did the Plaintiffs/Respondents in the present case. Thus neither the holding nor the dicta of *Evans* conflicts in any way with the holding of the Court of Appeals in the present case.

B. A Comparison Of *Evans* To The Present Case Reveals The Fallacy Of Kaiser's Contentions That A Large Class Of Cases Might Be Affected By Any Precedent Set By The Court Of Appeals' Decision

Kaiser wrongly persists in contending that the limited fact-specific holding of the Court of Appeals in the present case could affect thousands of final controlling judgments entered prior to October 1, 1982, which it contends have not yet been marked as "satisfied" by records kept by the District Court Clerk's office. The simple undisputed and undeniable fact recognized in the Court of Appeals' Opinion in the present case contradicting Kaiser's contentions is that no final controlling judgment was entered in the present case until years after the effective date of the amendment to §1961.

Despite Kaiser's failure to discuss the issue in its appellate brief, the Court of Appeals, in the present case, correctly recognized the distinction between retroactive

application of new law and the *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), analysis regarding application of current law to *pending* cases:

> The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law. [citations omitted].

Bonjorno v. Kaiser Aluminum & Chemical Corp., 865 F.2d 566, 573 (3d Cir. 1989), Kaiser's Petition at A-17.

The Court of Appeals correctly concluded that the right to receive interest did not vest until a final controlling judgment was entered on the merits, well after the effective date of the amendment to 28 U.S.C. §1961:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Bonjorno v. Kaiser Aluminum & Chemical Corp., 865 F.2d at 575, Kaiser's Petition at A-22.

Kaiser attempts to ignore the distinction between cases in which a final controlling judgment was entered prior to October 1, 1982 (e.g., *Evans*) and cases still pending in the Courts as of that date although a verdict or judgment has been entered in the district court (e.g., *Bonjorno v. Kaiser*). Although judgment creditors who obtained a final controlling judgment prior to the effective date of the amendment might contend that they ought to be entitled to interest at the T-bill rate provided in the amended statute, they clearly could not do so under the *Bradley v. School Board* analysis set forth in the Court of Appeals' Opinion in the present case regarding the application of current law to cases pending in the

courts. Where a final controlling judgment was entered prior to October 1, 1982, the *Bradley* analysis would emphatically *not* apply. Kaiser's suggestion that the Court of Appeals' decision could affect judgments in that category is therefore incorrect.

The Court of Appeals' Opinion could conceivably affect other cases in which an original verdict or judgment was entered prior to October 1, 1982 but only those in which a final controlling collectible judgment was entered after that date. Because of the passage of time, that is obviously a very narrow category of cases, and is not a category Kaiser has even attempted to quantify.

Finally, the difference between cases such as *Evans* (involving final controlling judgments entered prior to October 1, 1982) and the present case (involving litigation pending in the Courts as of October 1, 1982 and still pending today) demonstrates that Kaiser's contentions that *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), somehow altered the law are disingenuous.[2]

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[2] The *Bowen* case provides no basis whatsoever for Kaiser's explanation as to why it relied on *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) in the court below and now seeks to disavow the *Bradley* rule.

Kaiser improperly attempts to excuse its dramatic change of position on the applicability of *Bradley* by contending that *Bowen* somehow altered the law, despite the fact that *Bowen* did not even mention or cite *Bradley*. Kaiser's Reply Brief at 5.

Bowen merely dealt with the issue of an attempt to collaterally attack a final controlling judgment, which has nothing to do with the category of cases covered by *Bradley*.

Moreover, as Kaiser acknowledges, *Bowen* did not state any new principles of law, but merely reiterated this Court's hoary precedent.

Bowen v. Georgetown involved an attempt at retroactive rulemaking by a federal agency attempting to overrule the effect of a federal district court judgment as to which the Secretary had taken no appeal, and the time for appeal had elapsed, thus constituting an attempt to alter a fi. al controlling judgment. *Bowen v. Georgetown* has nothing to do with the *Bradley* analysis regarding application of current law to *pending* cases absent manifest injustice. Like *Evans*, and unlike the present case, *Bowen v. Georgetown* involved an attempt to collaterally alter the effect of a final controlling judgment.

III. CONCLUSION

For the reasons stated above, Respondents respectfully submit that the *Evans* case does not support Petitioners, as advanced in their Reply Brief at page 2. Rather it supports the arguments set forth in Respondents' Brief in Opposition to Kaiser's petition for certiorari. Respectfully, Respondents request that the Court deny Kaiser's petition.

Respectfully Submitted,

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